

OPINION AND ORDER

This appeal raises the issue of when off-duty misconduct may justify the removal of a non-probationary competitive service employee, an issue not previously addressed by this Board. The issue involves the historically perplexing question of how such misconduct must relate to "the efficiency of the service" before action may be warranted under Chapter 75 of Title 5, U.S. Code. It also involves the impact on that standard of a statutory provision newly enacted by the Civil Service Reform Act of 1978 (the Reform Act), which now makes it a prohibited personnel practice to take a personnel action discriminating "on the basis of conduct which does not adversely affect the performance of the employee . . . or the performance of others." 5 U.S.C. 2302(b)(10).

The presiding official in the Board's Philadelphia Field Office sustained the removal of appellant Elijah Merritt from his position as Correctional Officer with the Bureau of Prisons of the Department of Justice (the agency). The basis of appellant's removal was the single sustained charge of possessing and using in his home a small quantity of marijuana, which appellant admittedly shared on one occasion with two fellow employees during off-duty hours.

We reopened the appeal on our own motion for consideration of the requisite nexus between the off-duty misconduct and the efficiency of the service. The appellant and the agency have responded with briefs. In addition, after the Board invited amicus briefs on that issue by notice published in the Federal Register,¹ briefs from 22 agencies, organizations and interested persons have been received and considered.²

I. FACTUAL BACKGROUND

The appellant had been employed with the agency for eighteen months when his removal was effected based on three charges: (1) possessing and using marijuana; (2) failing to cooperate in an investigation; and (3) making conflicting statements in an investigation. The referenced

¹45 Fed. Reg. 6677 (1980). The notice also related to several other appeals raising similar issues; those cases will be decided separately.

²Briefs were received from the Departments of Agriculture, Air Force, Army, Defense, Energy, Health and Human Services, Interior, Justice, Navy, State, Transportation, and Treasury, the Office of Personnel Management, National Security Agency, U.S. Postal Service, Veterans Administration, the American Federation of Government Employees AFL-CIO, the National Treasury Employees' Union, the Government Accountability Project, the Chicago law firm of Stack & Filpi, and from two individuals, Franklin E. Kameny and Hugh T. O'Reilly.

investigation concerned the introduction of contraband into the Lewisburg Penitentiary, but the appellant was not charged with introducing contraband. After the agency withdrew the last two charges on appeal because of insufficient evidence, the presiding official sustained the first charge based on appellant's own admission.

Appellant contended that his removal on the one sustained charge did not promote the efficiency of the service, especially in light of his acceptable and improving performance record. The agency asserted that his disregard of the law in possessing marijuana destroyed the trust that the agency must have in his vigorous enforcement of the contraband regulations of the institution, particularly those prohibiting the possession and use of marijuana in the facility. Additionally, the agency argued that appellant could be subject to "pressures and blackmail" by inmates who might learn of his offense.

The presiding official found that the agency had established that the removal of appellant based on the sustained charge promotes the efficiency of the service. He further found that appellant's claim of disparate treatment in comparison to other employees who engaged in illegal gambling within the penitentiary grounds or assaulted prisoners was not relevant, since such misconduct did not affect an officer's ability to perform his duties in the same way as appellant's misconduct. Finally, the presiding official found that appellant's prima facie showing of racial discrimination³ was rebutted by the agency's demonstration that it had a rational, nondiscriminatory reason for effecting appellant's removal.

Appellant petitioned for review of the initial decision, contesting the presiding official's findings with respect to the disparate treatment and racial discrimination claims, in addition to the presiding official's determination that appellant's removal promotes the efficiency of the service. Having already reopened this appeal, we have considered appellant's arguments in his petition and the agency's reply, as well as the briefs filed in response to our reopening order and the amicus briefs.

II. EFFICIENCY OF THE SERVICE STANDARD

The removal of a federal employee for misconduct is governed by 5 U.S.C. Chapter 75. Section 7513(a) of that Chapter, as amended by the Reform Act,⁴ provides that:

Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter

³The showing of discrimination consisted of statistical evidence indicating that while blacks like appellant constituted only 7 percent of the Correctional Officer/ Correctional Supervisor work force, they had been affected by more than 87 percent of the agency's removal actions after January 1, 1977. Appellant also showed that 100 percent of the black correctional officers disciplined by the agency were removed, while only 11 percent of the non-black officers disciplined were removed.

⁴Pub. L. No. 95-454, Sec. 204(a), 92 Stat. 1136 (1966). See 5 U.S.C. 7512 for other actions to which section 7513(a) applies. See also 5 U.S.C. 7503(a).

against an employee *only for such cause as will promote the efficiency of the service.* [Emphasis supplied]

Regulations to implement section 7513(a) have been issued by the Office of Personnel Management (OPM) in 5 C.F.R. Part 752,⁵ but those regulations do not attempt to define or elaborate upon the statutory "efficiency of the service" standard. See 5 C.F.R. 752.403 (1980). Moreover, such prescriptions as appeared on this subject in former Federal Personnel Manual (FPM) Supplement 752-1 were revoked by OPM effective January 11, 1979,⁶ and the replacement FPM chapter 752 contains "guidance and information only; no discussion in it is considered to set a required practice."⁷

While no directly applicable regulatory interpretation of the standard is available, the statutory language echoes that of predecessor statutes dating back to the Lloyd-La Follette Act in 1912.⁸ Prior to the enactment of the Reform Act, the "efficiency of the service" standard was codified in 5 U.S.C. 7501(a) and 7512(a). Pub. L. No. 89-554, 80 Stat. 527, 528 (1966). The courts have thus had many years in which to interpret that standard in the context of charges relating to off-duty misconduct. Therefore, to determine what the standard requires, we commence by examining the pertinent judicial decisions in order to ascertain the state of the case law on this subject at the time Congress in 1978 re-enacted the standard while simultaneously enacting 5 U.S.C. 2302(b)(10).

A. Judicial Treatment of the Standard

Any casual review of the many federal court decisions on this subject is bound to suggest a widespread lack of judicial consensus as to the requirements of the statutory standard, with results that sometimes appear clearly inconsistent under circumstances that seem distinguishable only by the most fanatical hairsplitter.⁹ Nevertheless, we find that

⁵OPM is authorized by 5 U.S.C. 7514 to prescribe regulations "to carry out the purpose" of chapter 75, subchapter II, "except as it concerns any matter with respect to which the Merit Systems Protection Board may prescribe regulations."

⁶FPM Bulletin 752-8 (Feb. 20, 1979). Subchapter S3-1a of the former Supplement defined "cause" in the statutory standard as "a recognized offense against the employer-employee relationship. Causes for adverse action run the entire gamut of offenses against the employer-employee relationship, including inadequate performance of duties and improper conduct on or off the job . . ." (Feb. 1972). The Supreme Court upheld the standard of "cause" as so defined against a constitutional challenge for overbreadth and vagueness in *Arnett v. Kennedy*, 416 U.S. 134, 159-65 (1974).

⁷FPM ch. 752-1, subch. 1-1(a) (Dec. 31, 1980). *But cf.* 5 C.F.R. 731.202 relating to OPM suitability determinations and 5 C.F.R. Part 735 relating to agency standards of conduct, especially §§ 735.201a, 735.209. Any new regulatory requirements which OPM may hereafter propose to establish on this subject would presumably now be governed by 5 U.S.C. 1103(b) and 1105, as amended by the Reform Act, which make Administrative Procedure Act rulemaking procedures applicable to "any rule or regulation which is proposed by the Office and the application of which does not apply solely to the Office or its employees."

⁸37 Stat. 555, as amended by Pub. L. No. 623, 62 Stat. 354 (1948).

⁹*E.g., compare Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969), with *Schlegel v. United States*, 416 F.2d 1372 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970).

a degree of clarity begins to emerge if we consider first the posture in which such cases reach the federal courts. Aside from the facts of any particular cases and the possible effects of varying attitudes toward shifting social mores in controversial areas of conduct, we note two judicial circumstances which must inevitably shape the lessons to be derived from federal court decisions involving challenges to the removal of federal employees for off-duty misconduct.

First, such cases reach the federal courts only upon the discharged employee's appeal, when the Board (or the Civil Service Commission before it) has sustained the removal action. There is no judicial review available to employing agencies when the Board or Commission has reversed the agency's removal action as insufficiently related to the efficiency of the service.¹⁰ Consequently, the federal courts have been afforded no occasion for telling the Board or Commission whether it erred in *reversing* an employing agency's action, only occasions for saying when the Board or Commission erred in *sustaining* a removal. Given the judicial deference accorded to administrative decisionmakers, particularly in the government's role as employer,¹¹ and the heavy burden of persuasion upon plaintiff-appellants in federal court to demonstrate agency arbitrariness or abuse of discretion, this means that judicial decisions reversing Board or Commission-approved removals are more clearly definitive for the Board's purposes than those affirming such

¹⁰Prior to the Reform Act, federal court jurisdiction for employee appeals was typically based on the general federal question statute, 28 U.S.C. 1331 (1976), and also on the Administrative Procedure Act, 5 U.S.C. 702 (1976), at least until the latter jurisdictional basis evaporated under the Supreme Court's decision in *Califano v. Sanders*, 430 U.S. 99 (1977). The Reform Act now provides direct authority for employee appeals, 5 U.S.C. 7703. It also provides that under certain circumstances, OPM (but not employing agencies) may now petition for discretionary review of MSPB decisions in the Court of Appeals for the District of Columbia Circuit. See 5 U.S.C. 7703(d).

¹¹*E.g., Wathen v. United States*, 527 F.2d 1191, 1197-98 (Ct. Cl. 1976), *cert. denied*, 429 U.S. 827 (1976):

In our estimation the agencies and the Civil Service Commission are far better equipped and in a better position to make these sensitive judgments of whether and how a discharge promotes efficiency of the service. It is their prerogative, not ours, to do so. . . .

. . . [W]e have consistently interpreted determinations of what will promote the efficiency of the service under the Lloyd-LaFollete Act and the Veterans' Preference Act . . . as discretionary with the employing agency officials and the Civil Service Commission . . . Plaintiff must overcome the presumption of good faith on the part of administrative officers. It requires almost irrefragable proof to demonstrate abuse of discretion sufficient to overcome the presumption. It is not even necessary that the court find that the agency construction is the only reasonable one or that it is the result the court would have reached had the question been permitted to arise in the first instance in judicial proceedings. . . . Accordingly, we do not decide whether this [off-duty conduct] . . . amounts to such cause for removal as will promote the efficiency of the service. That is not our function.

removals.¹² The judicial decisions provide some outer parameters for determining when a removal does *not* promote the efficiency of the service, but they provide no such parameters and only inferential guidance for determining when a removal *does* promote service efficiency because the federal courts have had no occasion to reach the latter question.

Second, only in relatively recent years have most of the courts entered upon a "transition from unreviewability to reviewability"¹³ of adverse personnel actions against federal employees. The older cases typically held that such actions were not subject to judicial review except for compliance with procedural requirements, being matters of Executive Branch discretion.¹⁴ Some of the courts may still incline toward that view.¹⁵ Others have extended their review only to a determination of whether the dismissal was "arbitrary or capricious" or had some "rational basis," while perhaps a majority of the jurisdictions now declare that judicial review is under the substantial evidence rule.¹⁶ Such variations in the scope of judicial review are apt to affect the degree of scrutiny which the courts give to the basis for an agency's action, and particularly the extent to which the courts insist upon an evidentiary basis for the conclusion that service efficiency is promoted by the removal action.¹⁷

¹²The courts have often voiced uncertainty about the wisdom or propriety of an agency action while affirming that action. *E.g.*, *Masino v. United States*, 589 F.2d 1048, 1049 (Ct. Cl. 1978); *Embrey v. Hampton*, 470 F.2d 146, 147 (4th Cir. 1972).

¹³*Doe v. Hampton*, 566 F.2d 265, 271 (D.C. Cir. 1977).

¹⁴*See, e.g.*, *Eberlein v. United States*, 257 U.S. 82, 84 (1921) ("It is settled that in such cases the action of executive officers is not subject to revision in the courts"); *Schlegel v. United States*, 416 F.2d 1372, 1377 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970) ("Whether a person's discharge will promote the efficiency of the service is an administrative decision to be determined within the discretion of the agency, and no court has power to review the action, if taken in good faith"); *Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1968) (per curiam); *Jenkins v. Macy*, 357 F.2d 62, 66 (8th Cir. 1966); *Green v. Baughman*, 243 F.2d 610, 613 (D.C. Cir.), *cert. denied*, 355 U.S. 819 (1957); *Hargett v. Summerfield*, 243 F.2d 29, 32 (D.C. Cir. 1957); *Carter v. Forrestal*, 175 F.2d 364, 365-66 (D.C. Cir.), *cert. denied*, 338 U.S. 832 (1949).

¹⁵*See, e.g.*, *Turner v. Campbell*, 581 F.2d 547, 548 (5th Cir. 1978). *See also* *Wathen v. United States*, *supra* note 11. *But cf. Masino v. United States*, 589 F.2d 1048, 1054-55 (Ct. Cl. 1978).

¹⁶Cases illustrating the divisions among the jurisdictions are summarized in *Phillips v. Bergland*, 586 F.2d 1007, 1012 (4th Cir. 1978), and in *Doe v. Hampton*, 566 F.2d 265, 271 n.15 (D.C. Cir. 1977).

¹⁷The differences among these standards of review may not be easy to articulate, but it is generally accepted that the "substantial evidence" test "afford[s] a considerably more generous judicial review than the 'arbitrary and capricious' test. . . ." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 143 (1967).

The reviewing posture of the federal courts contrasts markedly with the Board's broad *de novo* review authority under 5 U.S.C. 7701. *See Douglas v. Veterans Administration*, 5 MSPB 313, 316-18, 325-26 (1981).

However, the clearly discernible trend over the past decade or so has been toward closer judicial examination of agency claims that an employee's off-duty behavior relates sufficiently to the efficiency of the service to justify firing the employee for that behavior. The most difficult question may be whether evidence of actual adverse impact on the service is necessary or whether mere rational explanation of hypothesized impact is adequate to establish the requisite relationship to service efficiency in a particular case. But even in applying "arbitrary or capricious" review to similar off-duty misconduct, the courts may reach different results depending largely on whether the agency has presented evidence (as distinct from argument or speculation) linking the conduct to the efficiency of the agency.¹⁸

The trend toward closer judicial scrutiny of off-duty misconduct as allegedly related to service efficiency received its initial impetus from the 1969 decision of the D. C. Circuit in *Norton v. Macy*, 417 F.2d 1161. Observing that "[t]he Due Process Clause may . . . cut deeper into the government's discretion where a dismissal involves an intrusion upon that ill-defined area of privacy which is . . . a foundation of several specific constitutional protections," *id.* 1164, the court reversed the removal of a NASA budget analyst on alleged grounds of "immoral conduct" and of possessing personality traits which rendered him "unsuitable for government employment." The court found that the employee's homosexual advance toward a stranger while off-duty had been proved as alleged by the agency, but concluded that the discharge was unlawful because the record established no "reasonable connection" between the evidence against him and the efficiency of the service. The *Norton* court reasoned that:

These circumstances involving the posture and scope of judicial review relate to the reach of the "holdings" that may be ascribed to judicial decisions in this area. Attention to these distinctions is essential to distinguish binding judicial holdings on legal questions from matters on which the Board's broad *de novo* adjudicative function gives it greater latitude of review than the courts. See *Douglas v. Veterans Administration*, *ibid.* In a close case, a court might well uphold the Board's conclusion as supported by "substantial" evidence and not arbitrary or an abuse of discretion (see 5 U.S.C. 7703(c)), whichever outcome the Board may reach. But the Board must still determine for itself which outcome to reach applying the preponderance standard under its *de novo* review authority. If the Board mistakenly treats judicial affirmance of removals as mandating that we sustain all similar removals, we would constrict our function and abandon our Section 7701 responsibility. That responsibility does not permit us simply to tolerate any agency action which is not so noxious that if we sustained it the courts would clearly reverse us even under their narrower scope of review.

¹⁸Compare *McDowell v. Goldschmidt*, 498 F.Supp. 598 (D. Conn. 1980) (affirming removal of an air traffic controller for conviction of possessing marijuana where agency presented evidence that the incident had become common knowledge among local pilots and fellow controllers who resultingly mistrusted his reliability on the job) with *Greboz v. U.S. Civil Service Comm'n*, 472 F.Supp. 1081 (S.D.N.Y. 1979) (reversing removal of letter carrier for drug convictions where evidence showed that the conduct did not affect his job performance and record was "utterly devoid of evidence linking the conduct with the efficiency of the agency"). The Second Circuit appears to apply the "arbitrary or capricious" scope of review. *McTiernan v. Gronouski*, 337 F.2d 31, 34 (2d Cir. 1964).

... the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity. And whatever we may think of the Government's qualifications to act *in loco parentis* in this way, the statute precludes it from discharging protected employees except for a reason related to the efficiency of the service.

Id., 1165.

The only justification for removal mentioned by the agency in *Norton* was the possibility of embarrassment to the agency. The agency failed to establish and the court could not discern any "reasonably foreseeable, specific connection between [the] employee's potentially embarrassing conduct and the efficiency of the service." *Id.*, 1167. Insisting that the employing agency "must demonstrate some 'rational basis' for its conclusion that a discharge 'will promote the efficiency of the service,'" the court held that the sufficiency of the charges "must be evaluated in terms of the effects on the service of what in particular he has done or has been shown to be likely to do." *Id.*, 1164, 1166.¹⁹

¹⁹ *Accord, Ashton v. Civiletti*, 613 F.2d 923, 921 (D.C. Cir. 1980) (reversing the district court's dismissal and remanding for a determination of whether an FBI mail clerk's homosexuality justified his removal because it was job-related); *Scott v. Macy*, 349 F.2d 182, 185 (D.C. Cir. 1965) (reversing the disqualification of an applicant for employment based on homosexual conduct); *Society for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399, 400 (N.D. Cal. 1973), *affirmed on other grounds*, 528 F.2d 905 (9th Cir. 1975) (reversing the removal of a Department of Agriculture supply clerk for homosexuality); *Baker v. Hampton*, 6 E.P.D. par. 9043 (D.D.C. 1973) (reversing the removal of two clerk-typists by the National Bureau of Standards where they had refused to answer questions concerning their homosexuality because no job nexus was established). *Contra, Schlegel v. U.S.*, 416 F.2d 1372, 1378 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970) ("Any schoolboy knows that a homosexual act is immoral, indecent, lewd, and obscene. . . . If activities of this kind are allowed to be practiced in a government department, it is inevitable that the efficiency of the service will in time be adversely affected"); *Vigil v. Post Office Department of the U.S.*, 406 F.2d 921, 925 (10th Cir. 1969) (affirming the removal of a janitorial assistant who participated in homosexual acts); *Anonymous v. Macy*, 398 F.2d 317, 318 (5th Cir. 1968), *cert. denied sub nom. Murray v. Macy*, 393 U.S. 1041 (1969) (affirming the removal of a Post Office employee for committing homosexual acts); *Williams v. Hampton*, 7 E.P.D. par. 9226 (N.D. Ill. 1974) (affirming the removal of a V.A. housekeeping aid for homosexuality); *Richardson v. Hampton*, 345 F.Supp. 600, 609 (D.D.C. 1972) (dismissing the appeal of an applicant for employment which was refused until the applicant released information from his physicians concerning his homosexuality).

See also *Beller v. Middendorf*, 632 F.2d 788, 812 (9th Cir. 1980) (upholding a former Naval regulation requiring the separation from the military service of known homosexuals, while questioning its breadth); *Singer v. U.S. Civil Service Commission*, 530 F.2d 247, 256 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977) (vacating the affirmance of the removal of an EEOC clerk-typist for flaunting his homosexual lifestyle while identifying himself as a member of a Federal agency, and remanding the case to the court of appeals for reconsideration in light of the new position taken by the Solicitor General in a memorandum to the court); *Gayer v. Schlesinger*, 490 F.2d 740, 751 (D.C. Cir. 1973) (reversing the withholding of a Defense Department employee's security clearance for homosexuality because the investigative questions were deemed too probing).

Following *Norton*, private sexual conduct involving only consenting adults was similarly found unrelated to service efficiency in *Mindel v. U. S. Civil Service Commission*, 312 F.Supp. 485, 488 (N.D. Cal. 1970), in which a district court reversed the removal of a postal clerk for cohabitating with a woman to whom he was not married, finding that there was no "rational nexus" between such conduct and the duties of a postal clerk. Also, in *Major v. Hampton*, 413 F.Supp. 66, 71 (E.D. La. 1976), a district court reversed the removal of an Internal Revenue Service return examiner for maintaining an apartment for discreet off-duty extramarital affairs, again finding a lack of nexus. The *Major* court noted:

The examiner and the Appeals Review Board appear to have assumed that a person's moral character is homogeneous: those who behave improperly in one regard are likely to transgress in others. But this is both a logical nonsequitur and a psychological error. . . .

A person may have impeccable sexual standards—or indeed be celibate—and yet steal. On the other hand, thieves may be faithful to their wives and attend religious services regularly.

413 F.Supp. at 71 n.4.²⁰

In *Gueory v. Hampton*, 510 F.2d 1222 (D.C. Cir. 1974), a differently constituted panel of the D.C. Circuit signaled a partial retreat from any implication in *Norton* that there must always be evidence directly substantiating the linkage of an employee's off-duty conduct to the efficiency of the service.²¹ Considering the removal of a postal foreman based upon his conviction for manslaughter, the court concluded that conviction of such a serious crime supplies the requisite nexus even without a showing of an explicit deleterious effect on the efficiency of the service. Finding that "it is clear that manslaughter, the unlawful taking of a human life, falls in the area where the nexus is strong and secure," the court nevertheless cautioned:

We readily recognize that the nexus may become attenuated if an agency attempts to invoke the regulation for activities of a minor nature, such as a traffic citation. We leave the difficult task of drawing a line of demarcation for a future time.

510 F.2d at 1226.

²⁰See also *Burns v. Pomerleau*, 319 F.Supp. 58, 67 (D. Md. 1970) (reversing the removal of a probationary Baltimore policeman for practicing nudism because it was not shown to affect the efficiency of the performance of his duties). *Norton* was also followed in *White v. Bloomberg*, 345 F.Supp. 133 (D. Md. 1972), reversing the removal of a postal employee for failure to pay a debt owed to a private creditor because nothing in the record suggested a "reasonable connection" between the evidence against the employee and the efficiency of the service.

²¹The Court of Claims preferred Judge Tamm's dissent to the majority opinion in *Norton*. See *Wathen v. United States*, 527 F.2d 1191, 1197 (Ct. Cl. 1975), cert. denied, 429 U.S. 827 (1976). But see *id.*, 1207-08 (Judge Nichols concurring in denial of rehearing en banc).

The court also emphasized in *Gueory* that the presumption of nexus for such a serious crime is not "irrebuttable," and that "mere incantation by an agency of the interpretive regulation involving less serious criminal conduct might necessitate a different result."²² 510 F.2d at 1227.

The nexus requirement was given further elaboration by the D.C. Circuit in *Doe v. Hampton*, 566 F.2d 265 (1977),²³ involving the dismissal of a clerk-typist on grounds of mental disability. The case did not concern off-duty misconduct, but the court's statement of the nexus requirement related generally to all adverse personnel actions:

In law as well as logic, there must be a clear and direct relationship demonstrated between the articulated grounds for an adverse personnel action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interest promoting the "efficiency of the service."

Id., 272. The rationale for that requirement was explained as follows:

The nexus requirement serves the salutary end of helping to ensure against abuse of personnel regulations by mandating that an adverse action be taken only for reasons that are directly related to a legitimate governmental interest, such as job performance. As a corollary, it also serves to minimize unjustified governmental intrusions into the private activities of federal employees.

The nature of the particular job as much as the conduct allegedly justifying the action has a bearing on whether the necessary relationship obtains. The question thus becomes whether the asserted grounds for the adverse action, if found supported by evidence, would directly relate either to the employee's ability to perform approved tasks or to the agency's ability to fulfill its assigned mission.

Id., 272 n.20.

²² *Accord, Johnson v. United States*, 628 F.2d 187, 195 (D.C. Cir. 1980) (affirming the removal of a Bureau of Alcohol, Tobacco, and Firearms special agent who used his service revolver to shoot at a moving vehicle with the intent to kill the driver during an off-duty incident unrelated to his work); *Elliott v. Phillips*, 611 F.2d 658, 660 (6th Cir. 1970) (affirming the removal of a postal manager for killing his mistress' husband in self-defense); *Wathen v. United States*, 527 F.2d 1191 (Ct. Cl. 1975), *cert. denied*, 429 U.S. 821 (1976) (affirming the removal of an IRS agent for killing his mistress, notwithstanding the fact that he was acquitted on grounds of insanity from which he had since recovered). Compare *Phillips v. Bergland*, 586 F.2d 1007 (4th Cir. 1978) (reversing the removal of an Agriculture Department research engineer for assaulting a fellow employee during an off-duty argument near the work site, because the agency failed to "spell out how removal would promote the efficiency of the service" where the employee was suffering at the time of the incident from a temporary psychiatric disability from which he had since recovered and the argument was not work-related). But see *Fugate v. LeBaube*, 372 F.Supp. 1208, 1214 (N.D. Tex. 1974) (reversing the removal of an IRS tax technician for shooting at her son-in-law who had beaten her daughter).

²³ *Doe* was authored by Judge Tamm, who also wrote that court's opinion in *Gueory*.

Shortly after *Doe v. Hampton*, the Seventh Circuit addressed the question of whether a nexus determination requires explicit evidence in its widely-quoted decision in *Young v. Hampton*, 568 F.2d 1253 (1977). As we read that opinion, virtually all of the more recent cases, and *Norton* and *Gueory* as well, can fit within the analytical frame laid down in *Young*. The court there reversed the removal of a product inspector by the Department of the Army based upon a conviction for off-duty possession of marijuana and other controlled substances (amphetamines, barbiturates, etc.) in his home. Federal regulations at 5 C.F.R. 731.202(b)(2) permit suitability removals of an employee for "criminal, dishonest, infamous, or notoriously disgraceful conduct," the court noted, but, as under the statutory standard for disciplinary adverse actions, a removal on such grounds is permitted only if such action will promote the efficiency of the service. In an opinion which thoroughly reviewed the existing case law, the *Young* court established these criteria for determining whether there is a rational basis for concluding that an employee's removal for off-duty misconduct will promote the efficiency of the service:

The agency may base this determination . . . on [1] evidence adduced at the employee's hearing which tends to connect the employee's misconduct with the efficiency of the service; or [2], in [a] certain egregious circumstances, where the adverse effect of retention on the efficiency of the service could, in light of the nature of the misconduct, reasonably be deemed substantial, and [b] where the employee can introduce no evidence showing an absence of effect on the efficiency of the service, the nature of the misconduct may "speak for itself."

Id., 1257.

The agency in *Young* had failed to introduce a scintilla of evidence relating to the nexus question, while the employee presented testimony by his supervisor and foreman to the effect that the employee continued to do good work following his conviction. The court held, therefore, that the "vital nexus" had not been established. In so concluding, the *Young* court distinguished two earlier cases upholding removals based on drug charges, on the ground that evidence in those cases linked the charges with the employees' capacity to perform their jobs reliably.²⁴

It is important to observe that the test established by *Young v. Hampton*, while permitting the requisite nexus to be inferred in some cases

²⁴The court noted that in *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963), cert. dismissed, 379 U.S. 951 (1964), the discharged air traffic controller was an admitted marijuana user whose position required split-second judgment and daily responsibility for many hundreds of lives, and that in *Madden v. U.S. Civil Service Comm'n*, No. C-73-1281 SC (N.D. Cal. Feb. 27, 1974), there was testimony showing that any drug usage was incompatible with the employee's duties as a winchman loading live ammunition aboard warships. *Young*, supra, 568 F.2d at 1261. In *Norton v. Macy*, supra, 417 F.2d at 1166, the D.C. Circuit expressed "considerable doubt" about the continuing authority of *Dew v. Halaby*.

without an explicit evidentiary demonstration by the agency, does so only when two conditions are both met. The first is that the particular misconduct must be egregious and of such a nature that the adverse effect of the employee's retention on the efficiency of the service can reasonably be deemed substantial. The second condition is that no evidence shows an absence of adverse effect on the efficiency of the service. This second condition is equivalent to *Gueory's* holding that the presumption of nexus arising from a serious criminal act is not an irrefutable one. When either condition is not met, the nexus determination must be based on evidence connecting the employee's misconduct with the efficiency of the service.

As so understood, *Young*, is consistent with both *Norton* and *Gueory*. In *Norton* and *Young*, neither condition was met,²⁵ hence the failure of the agencies to present evidence of nexus was decisive. In *Gueory*, both conditions were satisfied,²⁶ hence the removal was sustained despite the absence of such evidence. While the difficulty remains of determining what offenses are of a nature and gravity sufficient to satisfy the first of these conditions, which no doubt involves judgments on which reasonable people can disagree,²⁷ we believe that the cases decided since *Young v. Hampton* can also be squared with its mode of analysis.

The Court of Claims agreed with the *Young* analysis of the nexus problem in *Masino v. United States*, 589 F.2d 1048 (1978). Applying the *Young* criteria to the removal of a customs inspector for personal use and transportation of a small quantity of marijuana from New York to Arizona, the Court found, with "some reluctance, and agreeing that the issue is close," *id.*, 1049, that both of the conditions for determining nexus without explicit linking evidence were satisfied. Emphasizing that the employee had transported and used the very contraband which as a customs inspector he was sworn to interdict, the court concluded that

²⁵The NASA official who fired Norton testified that he was a "competent employee" doing "very good" work, that the official was "not worried" about any possible effect on Norton's performance, that the official had even inquired of agency personnel officers "if there was any way around this kind of problem for the man . . .," and that there were not any "real security problems here to worry about." 417 F.2d at 1166-67. In *Young*, the "overwhelming and uncontradicted evidence [was] . . . to the effect that the efficiency of the service was not impaired by Young's continued employment." 568 F.2d at 1264.

²⁶The court in *Gueory* found that *Gueory* "was given opportunity after opportunity, hearing after hearing, to rebut" the presumption against him and that he had failed to do so. 510 F.2d at 1227. Judge Bazelon, dissenting to denial of rehearing en banc, believed that the strength of *Gueory's* showing called for a rebuttal from the agency. *Id.* at 1230.

²⁷In *Grebosz v. U.S. Civil Service Comm'n*, 472 F.Supp. 1081, 1088 (S.D.N.Y. 1979), Judge Tenney, referring to *Gueory's* holding that sufficiently serious criminal conduct raises a presumption of nexus to the efficiency of the service (similar to the first condition in *Young* referred to above), observed that:

"Drawing lines between the gravity of various offenses, which *Gueory* necessitates, is a difficult basis for decision and one of questionable merit. If a crime is 'serious,' presumably its gravity, in the context of particular cases, will enable agencies to articulate the bases for their conclusions that discharges will promote efficiency."

his conduct was so egregious that the adverse effect of retention on the efficiency of the service could reasonably be deemed "substantial." The employee having presented no evidence to show an absence of effect on the efficiency of the service, the removal action was sustained.²⁸

Two very recent decisions also seem consistent with the *Young* analysis. In *Cooper v. United States*, 639 F.2d 727 (Ct. Cl. 1980), the Court of Claims, while remanding for further factual findings in a discharged Navy employee's action for reinstatement, had no difficulty concluding that the employee's alleged sexual abuse of a five-year-old girl, if proven, would adversely affect the efficiency of the service. The particular conduct alleged was of a nature that would clearly be deemed abhorrent to any normal person, and the employee presented no evidence on his own behalf.²⁹

The D. C. Circuit, in *Yacovone v. Bolger*, No. 79-2043 (Slip Op., Feb. 20, 1981), reversing 470 F.Supp. 777 (D.D.C. 1979), upheld the removal of a postmaster for a shoplifting conviction, based on evidence that the offense had become notorious in the local community with a significant effect on his reputation for honesty and integrity, and that he occupied a position of authority with fiduciary responsibilities including accountability for local postal revenues.³⁰ Under these circumstances the court found that even though the appellant's conduct might be attributed to a mental illness of which he had since been cured, and in consequence of which he had since received a gubernatorial pardon, the nexus determination did not require evidence that the appellant's future conduct would interfere with the efficiency of the postal service.³¹

²⁸Compare *McDowell v. Goldschmidt* and *Grebosz v. U.S. Civil Service Comm'n*, *supra* note 18, with *O'Shea v. Blatchford*, 346 F.Supp. 742, 748 (S.D.N.Y. 1972) (reversing the removal of a Peace Corps volunteer for taking one drag on a marijuana cigarette while on leave in the U.S. because such conduct did not violate the intent of the Peace Corps rule forbidding "unauthorized possession or use of drugs").

²⁹The court's broad statement that "We do not quarrel with the Government's finding that sexual misconduct adversely affects the employer-employee relationship," 639 F.2d at 729-30, must of course be read in the context of the particular misconduct at issue in that case.

³⁰The Postal Service presented evidence that local townspeople would no longer trust the appellant; some witnesses threatened to take their postal business to other towns. *Yacovone v. Bailar*, 470 F.Supp. 777 (D.D.C. 1979).

³¹The *Yacovone* court distinguished *Norton v. Macy* as involving an intrusion upon privacy, as premised on a moral judgment, as involving duties which did not bring the employee into contact with the public, and because in that case fellow employees were unaware of the employee's "immorality" (Slip Op. at 9). The court reaffirmed its view that "[i]n some cases, the nexus must be explicitly demonstrated by the agency [citing *Phillips v. Bergland* (see note 22 *supra*) and *Norton*]. In others, the nexus can be inferred from the circumstances of the dismissal [citing *Doe v. Hampton* and *Gueory*]." (Slip Op. at 7). While the *Yacovone* court did not say into which category the facts of this case fell, or how to distinguish between the two categories, it did note that the "more searching nexus analysis" required under *Gueory* for less serious criminal offenses "was made in this case" (Slip Op. at 10 n.3).

At the time the Reform Act cleared the Congress in 1978, *Masino*, *Cooper*, and *Yacovone* had not yet been decided. Nor had *Phillips v. Bergland*.³² However, those cases are consistent with our analysis of the basic principles of *Norton*, *Gueory*, and *Young* as summarized above, which in 1978 represented the cutting edge of the decade-long trend toward judicial insistence that federal employee discharges for off-duty conduct must be related to the efficiency of the service. We find it particularly significant that at that time, before the Court of Claims had embraced the *Young* criteria in *Masino*, the leading nexus decision of that court—an especially important court for federal personnel cases—was *Wathen v. United States*, which expressed the extremely limited view of the court's reviewing role set out at note 11 *supra*.³³ One dissenting judge in *Wathen* criticized sharply the majority's proposition that the Court of Claims had no role in determining whether there was sufficient nexus between the removal action and the efficiency of the service. 527 F.2d at 1203. Two of seven judges dissented from an order denying rehearing en banc. *Id.*, 1207 nn. A third judge concurred with the result in *Wathen*, but found it "anomalous to have a single separate area of decision making excluded from judicial review when such exclusion is not based on express statutory provisions, absent here." *Id.*, at 1207. This was the current state of the law when Congress, while re-enacting the "efficiency of the service" standard in the Reform Act, also enacted 5 U.S.C. 2302(b)(10).³⁴

B. The Effect of Section 2302(b)(10)

The Reform Act, at 5 U.S.C. 2302(b)(10), makes it a prohibited personnel practice for any employee who has authority to take, direct others to take, recommend, or approve any personnel action, to:

discriminate for or against an employee or applicant for employment on the basis of conduct which does not adversely affect the perfor-

See also *Turner v. Campbell*, 581 F.2d 547, 549 (5th Cir. 1978) (affirming the removal of a special postal messenger for a burglary conviction resulting in a 60-day suspended sentence and 12 months' probation); *Embrey v. Hampton*, 470 F.2d 146, 148 (4th Cir. 1972) (affirming the removal of a civil service examiner for the Post Office based on a conviction for fraud in filing an F.H.A. loan application which resulted in three years' probation); *Cook v. United States*, 164 Ct. Cl. 438, 447 (1964) (affirming the removal of a Navy ship fitter based on a conviction for petit larceny resulting in a \$25 fine, even though full restitution was made).

But see *Pelicone v. Hodges*, 320 F.2d 754, 757 (D.C. Cir. 1963) (reversing the removal of a lithographic pressman and negative engraver for taking a hotel room with a prostitute, because that did not constitute "criminal conduct" as the agency contended).

³²See note 22 *supra*.

³³See also the Court of Claims' statement in *Schlegel v. United States*, quoted in note 14 *supra*.

³⁴Congress is presumed to be aware of the current interpretation of the law by the courts. *Cannon v. Univ. of Chicago*, 414 U.S. 677, 695 (1979); *United States v. Smith*, 521 F.2d 957, 968 (D.C. Cir. 1975); 2A Sands, Sutherland Statutory Construction § 49.09 (1973).

mance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States. . . .

Simultaneously, in re-adopting the efficiency of the service standard in 5 U.S.C. 7503(a) and 7513(a), Congress clearly intended to re-enact existing law. *See* S.Rep. No. 95-969, 95th Cong. 2d Sess. 47, 50 (1978). The question that necessarily then arises is whether Section 2302(b)(10) adds anything to the requirement of Sections 7503(a) and 7513(a) that Chapter 75 adverse actions be taken only "for such cause as will promote the efficiency of the service."

The Department of Justice and OPM assert that the only effect of Section 2302(b)(10) is to extend the protection of the nexus requirement to all the categories of employees and actions listed in 5 U.S.C. 2302(a)(2), and to make available to persons covered by Chapter 75 as well as to others the protective authority of the Special Counsel in situations of alleged discrimination for nonservice-related conduct through personnel actions not subject to Chapter 75. Clearly, Section 2302(b)(10) does at least that much on its face. To determine whether it does more, we turn to its legislative history.

Section 2302(b)(10) originated in the House, where it was adopted during committee mark-up on motion of Representative Harris, who explained:³⁵

MR. HARRIS. . . .

The amendment adds to the prohibited personnel practices this provision which would bar an official from taking action against any employee or applicant for employment as a reprisal for non-job related conduct. I think it is clear to prohibit discrimination against activities that have no bearing on one's job. Psychiatry, outside interests, a member of "NOW" or "Taxpayers Alliance" or what have you.

But to keep actions with regard to personnel divorced from activities that don't affect performance on the job and don't affect the performance of others on the job.

* * * *

What this amendment simply tries to do is make sure that all personnel actions are geared to activities that are job-related. It makes clear that someone cannot be punished in his or her job because of activities that are not job-related, that do not affect the performance of the person's job, that does not affect the performance of the other people working on it.

³⁵House Committee on Post Office and Civil Service, Mark-Up Session on H.R. 11280, 95th Cong., 2d Sess. 39-40 (June 21, 1978).

It is simply saying that any sort of disciplinary or other type of action should be job-related and not non-job-related conduct.

* * * *

MR. ROUSSELOT. Is this language present in any current civil service rule, regulation, practice, whatever?

MR. HARRIS. I think this is a perfection of existing regulation.

MR. ROUSSELOT. It does not exist in any present rule or regulation.

MR. HARRIS. Not in these exact words. I think we all have assumed that it is any sort of disciplinary or other type of action with respect to job-related. This just makes it clear that is the case.

* * * *

MR. ROUSSELOT. Can you give us an example of a current practice that this would prevent?

MR. HARRIS. I don't know that there is a specific practice that this would prevent. I know there are specific practices this would preclude.

There is the example of giving public demonstrations in favor of Proposition 13. There could be all sorts of raucous behavior. I say that is an American citizen's right. If he believes in this, he should go out and stump his belief. I think we should make it clear the merit system says that the citizen's right is retained and he can't be put off the job because he says something that the supervisor disagrees with.

The Senate Bill had no comparable prohibited personnel practice. As adopted by the House, the provision limited its proviso concerning criminal convictions to those involving "violence or moral turpitude." In conference the House provision was adopted, but without limiting the proviso to such crimes. The Conference Committee stated:³⁶

The Senate bill contains no express provision concerning non-performance related conduct of an employee or applicant.

The House amendment specifies that it is a prohibited personnel practice to discriminate for or against any employee or applicant on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others. The bill also provides, though, that nothing in the paragraph shall prohibit an agency from taking into account any conviction of the employee or applicant for any crime of violence or moral turpitude when determining suitability or fitness.

The conference report in section 2302(b)(10) adopts the House provision modified so that conviction of a crime may be taken into account when determining fitness or suitability of an employee or

³⁶H.R. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 131 (1978).

applicant. This provision is not meant as an encouragement to take conviction of a crime into account when determining the suitability or fitness of any employee or applicant for employment. Nor is it to be inferred that conviction of a crime is meant to disqualify an employee or an applicant from employment. The conferees intend that only conduct of the employee or applicant that is related to the duties to be assigned to an employee or applicant or to the employee's or applicant's performance or the performance of others may be taken into consideration in determining the employee's suitability or fitness. Conviction of a crime which has no bearing on the duties to be assigned to an employee or applicant or on the employee's or applicant's performance or the performance of others may not be the basis for discrimination for or against an employee or applicant.

Given the divided state of the case law on the nexus requirement current in mid-1978, as described *ante*, and the purpose of Section 2302(b)(10) as described by the Conference Committee and Representative Harris, we think it clear that 2302(b)(10) was intended to do something more than the Justice Department and OPM suggest. Section 2302(b)(10) has substantive as well as jurisdictional content. Moreover, Congress could not have intended to make a prohibited personnel practice under 2302(b)(10) of personnel actions based on conduct for which a competitive service employee could lawfully be removed under Chapter 75.

The language and purpose of Section 2302(b)(10) are inconsistent with simple perpetuation of the existing statutory standard subject to the then continuing judicial debate between the traditional narrow view represented by the *Wathen* majority and that represented by the *Norton-Gueory-Young* decisions. We find that in enacting Section 2302(b)(10), Congress intended to make clear that in applying the efficiency of the service standard under Chapter 75 as well as in considering the alleged prohibited personnel practice, a nexus determination is essential and the law requires the Board and the courts to assure that such requirement is properly satisfied. Section 2302(b)(10) reflects Congressional approval of the trend in judicial interpretation of the efficiency of the service standard, already apparent in mid-1978 but then still much disputed among the federal courts, toward closer scrutiny of nexus determinations made by agencies.

While Section 2302(b)(10) thus constitutes a rejection of the narrow, "hands off" *Wathen*-type deference to agency assertions, it does not go so far as to impose in all cases a requirement that evidence explicitly demonstrate adverse impact on service efficiency from the particular off-duty conduct. Any such conclusion would require agencies always to await actual impairment of their efficiency before taking action, which

would seem contrary to the public interest,³⁷ or would ignore the uncertainties inherent in predicting human behavior.³⁸ The legislative deliberations on Section 2302(b)(10) include none of the consideration one would expect of those serious and complex matters if such a far-reaching change were intended. Nor, significantly, was any change made in the efficiency of the service standard itself in this respect. Furthermore, the proviso in 2302(b)(10) for consideration of criminal convictions is a persuasive indication that no such dogmatic requirement was intended by the Congress. Cf. *Gueory v. Hampton*, *supra*.

We conclude that the requirements of Section 2302(b)(10) and the efficiency of the service standard are consistent with the *Norton-Gueory-Young* mode of analysis.³⁹ Accordingly, we adopt the criteria for nexus determinations established by those cases, as more particularly described in our discussion of *Young v. Hampton*, *ante* at 19-20. The effect of the two conditions specified in *Young* is that a nexus determination must be based on evidence linking the employee's off-duty misconduct with the efficiency of the service or, in "certain egregious circumstances," on a presumption of nexus which may arise from the nature and gravity of the misconduct. In the latter situation, the presumption may be overcome by evidence showing an absence of adverse effect on service efficiency, in which case the agency may no longer rely solely on the presumption but must present evidence to carry its burden of proving nexus. The quantity and quality of the evidence which the agency need present in that circumstance would clearly then depend upon the nature and gravity of the particular misconduct as well as upon the strength of the showing made by the appellant in overcoming the otherwise applicable presumption.

As with all factual questions in proceedings brought under 5 U.S.C. Chapter 75, the facts relied upon to establish a connection between the off-duty misconduct and the efficiency of the service must be proved by a preponderance of the evidence. Whether the facts as proven, including those established through any applicable presumption, logically support the conclusion that the agency discipline promotes the efficiency of the service is a question of law which must be decided in the affirmative before the action can be sustained.⁴⁰

³⁷See *Arnett v. Kennedy*, 416 U.S. 134, 169 (1974) (concurring opinion of Justice Powell).

³⁸Compare Rosenblum, *Moral Character*, 27 Stan. L. Rev. 925 (1975), with Bem & Allen, *On Predicting Some of the People Some of the Time: The Search for Cross-Situational Consistencies in Behavior*, 81 Psychol. Rev. 506 (1974).

³⁹Note the relationship between the privacy and associational interests of concern to Representative Harris in proposing Section 2302(b)(10) and those emphasized by the court in *Norton v. Macy*, *supra*, and *Doe v. Hampton*, *supra*. Cf. 5 U.S.C. 2301(b)(2); Note, *Application of the Constitutional Privacy Right to Exclusions and Dismissals from Public Employment*, 5 Duke L.J. 1037 (1973). And see *Greboz v. U.S. Civil Service Comm'n*, *supra*, 472 F.Supp. at 1089 n. 7.

⁴⁰To determine nexus *ex cathedra* as a matter purely of "law" would make nexus determinations a matter of irrebuttable legal presumption based potentially on the reviewing

We recognize the difficulty of "drawing a line of demarcation"⁴¹ based on the nature and gravity of the offense. It is clear, however, that neither Section 2302(b)(10) nor the judicial criteria which we adopt permits the requisite nexus to be presumed from the mere fact of criminal conviction alone, without regard to the character and seriousness of the offense.⁴² Concurrently, conviction *per se* is not a prerequisite to the presumption of nexus in an otherwise appropriate case. Among the cases we have surveyed, there appear to be only two in which affirmance of the nexus determination depended upon the presumption—one involved a criminal conviction for killing "a fellow human being when there was no necessity for the killing to have occurred. . . . an act of such violence,"⁴³ and the other involved an outrageously repellent act of child molestation for which, however, there had not been a conviction.⁴⁴

In most cases, even of clearly criminal conduct, the establishment of nexus need not and should not depend upon mere assertion or speculation.⁴⁵ In all cases it is the agency's burden to establish that the misconduct affects the efficiency of the service. *Phillips v. Bergland*, *supra*, 586 F.2d at 1010-11; *Young v. Hampton*, *supra*, 568 F.2d at 1257; *Douglas v. Veterans Administration*, 5 MSPB 313, 334 (1981); *Allen v. U.S. Postal Service*, 2 MSPB 582, 584 (1980).

III. THE NEXUS ISSUE IN THIS APPEAL

In ruling on the existence of a nexus between the appellant's off-duty misconduct and the efficiency of the service, the presiding official considered the applicability of *Young v. Hampton* and *Masino v. United States*, concluding:

In the instant case, . . . the appellant was not removed for criminal conduct. To the contrary, he was removed based on a determination that his possession and use of marijuana, when coupled with the fact that he made that substance available to other employees, was in conflict with the regulations which, as a Correctional Officer, he was expected to enforce. The fact that he was otherwise perceived

authority's visceral reaction to the offensiveness of particular off-duty conduct. While a degree of such risk may inhere also in determinations of whether any rebuttable presumption arises in particular cases, the opportunity to rebut such presumption on an individualized basis avoids the due process dangers that would arise from any irrebuttable presumption imposed as a matter of law. See *Gueory*, *supra*, 510 F.2d at 1227, citing *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), *Vlandis v. Kline*, 412 U.S. 441 (1973), and *Stanley v. Illinois*, 405 U.S. 645 (1972); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534 (1974).

⁴¹*Gueory v. Hampton*, *supra*, 510 F.2d at 1226.

⁴²See *Young v. Hampton*, *supra*, 568 F.2d at 1262-63; H.R. Conf. Rep. 95-1717, quoted in text at note 36 *supra*.

⁴³*Gueory v. Hampton*, *supra*, 510 F.2d at 1224.

⁴⁴*Cooper v. United States*, *supra*.

⁴⁵See the evidence on nexus presented by the agencies in *Yacovone v. Bolger*, described in text and at note 30, *supra*, and in *McDowell v. Goldschmidt*, described in note 18, *supra*. See also *Grebosz v. U. S. Civil Service Comm'n*, quoted in note 27, *supra*.

to be performing in an acceptable manner is not here mitigating, and, accepting the guidance in *Masino*, it is concluded that the appellant's removal was for such cause as will promote the efficiency of the service.

We find a fundamental flaw in the logic of this reasoning, which depends upon the assumption that appellant, like the customs inspector in *Masino*, acted in conflict with the agency's regulations concerning "the very contraband which . . . [he] was sworn to interdict." 589 F.2d at 1056. However, appellant was not charged with violating the agency's contraband regulations, and there is no evidence that he did so.

Federal regulations forbid "[t]he introduction of contraband into or upon the grounds of any Federal penal or correctional institution, or taking or attempting to take [such contraband] therefrom. . . ." 28 C.F.R. 6.1. The agency's Policy Statement 3735.1B, Attachment A, Section 8 (May 16, 1973), a copy of which the agency submitted for the record, defines "contraband" as "any article which is unauthorized under the circumstances and includes, but is not limited to . . . letters, stamps, tools, weapons, paper, food, implements, writing materials, messages, instruments, alcoholic beverages, drugs, and the like."

By the plain language of these regulations, appellant's conduct in the privacy of his home does not "conflict" with their proscription any more than would his possession and use of food, writing materials, or alcoholic beverages. The agency argues that appellant's conduct evidenced a disregard for the law which destroyed the trust that the agency must have in his vigorous enforcement of the contraband regulations. However, the agency offered no evidence to show that appellant is more likely to violate those regulations, or to enforce them with less vigor, than any other Correctional Officer. Certainly, appellant's conduct in his home gives rise to no logical inference of inclination on his part to violate the contraband regulations in the future, or to enforce them with laxity, any more than his baking a cake or drinking a beer at home would support an inference of likelihood that he would introduce unauthorized food or alcoholic beverages into the penitentiary or permit others to do so.

Appellant's misconduct in his home was not of an egregious character or gravity from which impairment of service efficiency can be presumed. *Young v. Hampton, supra*, 568 F.2d at 1258, 1260-61, 1264, 1265-66.⁴⁶ It was, therefore, the agency's burden to present evidence tending to prove that appellant's off-duty conduct affected the efficiency of the service. This the agency failed to do. The fact that appellant's conduct may have been unlawful did not relieve the agency of its burden to establish the requisite nexus, particularly in view of limitations upon the power of the Government to intrude unnecessarily upon the discreet

⁴⁶Cf. *People v. McCabe*, 49 Ill.2d 338, 275 N.E.2d 407 (1971) (classification of marijuana under Narcotic Drug Act is arbitrary and violates equal protection clause).

conduct of citizens, including federal employees, in the privacy of their homes.⁴⁷

Moreover, to the extent that the criminality of appellant's conduct warrants any inference of doubt about his reliability or trustworthiness, such inference was rebutted by appellant's evidence that during the five months following the marijuana incident his job performance improved and he was recommended for a promotion. The agency offered no evidence in response to this showing by appellant, and none to support its post-hearing argument of possible "pressures and blackmail" against appellant.

Under these circumstances, we find that the agency's nexus allegation is not supported by the preponderance of the evidence. See 5 U.S.C. 7701(c)(1)(B).

This conclusion makes it unnecessary for us to address appellant's further contentions in his petition for review.⁴⁸

CONCLUSION

Accordingly, the initial decision is hereby REVERSED, and the agency is ORDERED to cancel its removal action against the appellant and to furnish the Philadelphia Field Office with evidence of compliance with this order within twenty (20) days of its receipt hereof.

This is the final decision of the Merit Systems Protection Board in this appeal. The appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after the appellant's receipt of this order.

⁴⁷See *Stanley v. Georgia*, 394 U.S. 557 (1969) (right of a person to possess admittedly obscene materials in the privacy of his home); cf. *Norton v. Macy*, *supra*, 417 F.2d at 1164; *Doe v. Hampton*, *supra*, 566 F.2d at 272 n. 20; *Major v. Hampton*, *supra*, 413 F.Supp. at 70 n. 2. Such privacy considerations were not presented by the transcontinental transportation of marijuana at issue in *Masino v. United States*, *supra*.

Moreover, the *Masino* court acknowledged that the issue in that case was "close" and upheld the removal only with "some reluctance." 589 F.2d at 1049. While the court in *Masino* reviewed the Civil Service Commission's decision only to assure that it was "neither arbitrary, capricious nor unsupported by substantial evidence," *ibid.*, this Board under 5 U.S.C. 7701 exercises *de novo* review applying the preponderance of the evidence standard in Chapter 75 cases. See *Douglas v. Veterans Administration*, 5 MSPB 313, 316-18, 325-26 (1981); note 17, *supra*.

⁴⁸We do not here determine whether the agency committed a prohibited personnel practice against appellant under 5 U.S.C. 2302(b)(10), because that issue was not presented to the presiding official. Nor do we determine whether, under our finding that the agency lacked an adequate basis for removing appellant, a different conclusion must be reached from that set forth in the initial decision on appellant's affirmative defense of discrimination. Both of those issues may be presented for such consideration as the presiding official finds appropriate in connection with any motion which appellant may now file for attorney's fees pursuant to 5 C.F.R. 1201.37 and *Allen v. Postal Service*, 2 MSPB 582 (1980).

The appellant is also hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. Any such petition for judicial review must be filed in the appropriate court no later than thirty (30) days after the appellant's receipt of this order.

For the Board:

ERSA H. POSTON.
RONALD P. WERTHEIM.

WASHINGTON, D.C., June 8, 1981

OPINION OF CHAIRWOMAN PROKOP

Concurring in the Result

While I concur in the result reached in this case, I confess to considerable confusion regarding the analysis employed in the majority opinion to reach its decision. To the extent I differ with the analysis it is incumbent upon me as an adjudicator to set forth my separate views.

At the time the Board embarked upon its journey over the rough legal terrain known as off-duty misconduct we were fully aware of the difficult and perplexing issues inherent in this area of law. In our solicitation of amicus briefs,¹ we framed one difficult issue as "[w]hether a nexus between the off-duty misconduct and the employee's job performance [or the performance of others] must be proven by a preponderance of the evidence." Phrased another way, this question might be stated as whether an agency's determination that the disciplinary action taken was for such cause as will promote the efficiency of the service *must be supported by a preponderance of the evidence.*

Numerous agencies and private counsel briefed this question for the Board² and they are entitled to a clear and unequivocal ruling on an issue so critical to their future decisions regarding disciplinary actions on off-duty misconduct situations. Such guidance is not provided in the majority opinion and, in fact, its studiously ambiguous language will serve only to confuse further this already murky area of the law. While never expressly so holding, the majority opinion inherently suggests that an agency's determination on the nexus issue must be supported by a preponderance of the evidence. I strongly disagree.

In a rather quixotic manner, the majority seeks support for its application of an evidentiary standard (preponderance) to the "efficiency" issue from two precepts, which are dubbed "judicial circumstances" (Op.), that in my view, are involved tangentially in the instant case. First,

¹45 Fed. Reg. 48,290 (1980).

²Some 26 amicus briefs were filed by agencies, private attorneys, labor unions, individuals, and members of Congress in response to the Board's request.

it determined that judicial decisions provide only "inferential guidance" since the courts have no occasion to rule on the issue of when a removal *does* promote the efficiency of the service.³ Second, the majority finds support for its views from some "clearly discernible trend" during the past decade toward closer judicial scrutiny of off-duty misconduct as related to service efficiency.⁴

Whatever the ultimate merits of such views might be, I fail to appreciate the relevance of such "judicial circumstances" to the pragmatic issue before this Board of whether or not the nexus issue must be proven by a preponderance of the evidence. Approaching that question from a somewhat more simplistic view, I see the critical inquiry as being whether the statutory terminology "such cause as will promote the efficiency of the service" (the judicially designated nexus issue) presents a question of fact susceptible to proof by a preponderance of the evidence or whether

³To the extent that the "inferential guidance" terminology is intended to vest the Board with some authority, albeit undefined, to reach beyond court determinations and to impose an evidentiary standard upon agency decisions on nexus, I disagree. To the extent such language merely implies that the Board will be guided by the standards of review adopted by the various courts, I have no disagreement.

⁴Intertwined throughout the majority's allusion to what it views as a tendency toward closer judicial scrutiny in adverse personnel action cases (Op. 10) are cryptic references to "perhaps a majority of the jurisdictions" that employ the substantial evidence rule. Such a view finds little support in the long litany of court decisions involving off-duty misconduct issues, which uniformly apply a "rational basis" or "arbitrary or capricious" standard in evaluating such determinations. *E.g.*, *Yacavone v. Bolger*, No. 79-2043, slip op. at 10 (D.C. Cir. Feb. 20, 1981); *Masino v. United States*, 589 F.2d 1048, 1054-55 (Ct. Cl. 1978); *Young v. Hampton*, 568 F.2d 1253, 1257-58 (7th Cir. 1977); *Doe v. Hampton*, 506 F.2d 265, 274 (D.C. Cir. 1977); *Wroblaski v. Hampton*, 528 F.2d 852, 853 (7th Cir. 1976); *Gueory v. Hampton*, 510 F.2d 1222, 1226 (D.C. Cir. 1974); *Embrey v. Hampton*, 470 F.2d 146, 147 (4th Cir. 1972); *Norton v. Macy*, 417 F.2d 1161, 1164 (D.C. Cir. 1969); *Meehan v. Macy*, 392 F.2d 822, 830 (D.C. Cir. 1968); *Camero v. United States*, 345 F.2d 798, 804 (Ct. Cl. 1965).

In fact, the standard of review employed by the courts varies significantly among the jurisdictions, as illustrated in a footnote contained in *Doe v. Hampton*, 506 F.2d at 271 n. 15. This case was relied upon by the majority to support its "perhaps a majority of jurisdiction" proposition. (Op. 10.) However, in its enthusiasm for this line of reasoning, the opinion neglects to mention the remainder of the crucial footnote 15 where the court expresses doubt about whether such a rule is followed in fact and where the court itself declined to follow such a rule:

More recently, many and perhaps most of the judicial decisions reviewing adverse personnel actions also apply, or at least claim to apply, a so-called "substantial evidence" test. . . .

The legal source for this requirement that an adverse federal personnel action be supported by substantial evidence is, however, far from clear. . . .

. . . To require more evidence than would be sufficient for a decision to pass muster under the arbitrary or capricious test of 5 U.S.C. § 706(2)(A) is, in effect, to invent a more generous judicial review of these personnel matters than the reviewing courts are entitled to. [Citations omitted; emphasis added.]

The court in *Doe* declined to follow the substantial evidence test and instead utilized the "arbitrary or capricious" or "rational basis" test. *Id.*, 274, 275.

it is a question of law which requires employment of a reasoning process and the application of that reasoning process to the facts as proven. Instead of confronting this question directly, the majority opinion weaves its views throughout the analysis of leading cases suggesting, from time to time, that agencies will be required to prove nexus by a submission of evidence as opposed to argument.

This blurred treatment of the "nexus" question as an issue susceptible to evidentiary proof appears to flow from a fundamental confusion of the differences between questions of law and questions of fact. It is hornbook law that issues of fact and issues of law command different treatment by adjudicatory bodies, and that proposition has applied equally to administrative and judicial proceedings since the earliest days of administrative adjudications.⁵ Granted, there exists no absolute guide for distinguishing fact from law and the two concepts tend to merge from time to time. Nonetheless, there are some fundamental conceptual distinctions between the two.⁶ Issues of law relate to precepts generally and uniformly applicable to all persons of like quality and status in like circumstances, while the question of whether the facts of a particular case meet the legal norm is a matter of fact. *See Brown, Fact and Law in Judicial Review*, 56 Harv. L. Rev. 899, 904 (1943). As the author expressed the process in that classic treatment of the law/fact dichotomy:

Where a statute employs common-law terms and concepts, and where the primary facts are agreed upon, the question whether the statutory norm applies is usually regarded by the courts as one of the law. This may be one reason why the courts have considered that the decision that certain practices constitute "unfair methods of competition" under the Federal Trade Commission Act is not a conclusion of fact for the Commission, but a determination of law which the court may review.

Id., 913.

The parallels are inescapable between the "unfair methods of competition" and "such cause as will promote the efficiency of the service" standards. Both fall within the penumbra of legal questions which must be applied to facts established by the applicable standards of proof. The reasoning process inherent in reaching a legal conclusion that a disciplinary action was for such cause as will promote the efficiency of the service has been explicated by the courts:

The first judgment which an agency must make is that the individual to be disciplined *actually committed the complained of acts* (Point I). This is usually a question of facts adduced by the agency at the employee's hearing which tend to show the employee's involvement or participation in the alleged activities. . . .

⁵See, e.g., Rep. Att'y Gen. Comm. Ad. Proc. (1941) 88.

⁶See generally Pound, *The Administrative Application of Legal Standards*, Report to the 42d Meeting of the ABA (Sept. 3-5, 1919).

Once the agency has made a determination that the employee misconduct has, in fact, occurred, it must make a second determination. The *second determination . . . must be to the effect that the disciplinary action taken against the employee will "promote the efficiency of the service,"* (Point II). The agency may base this determination also on evidence adduced at the employee's hearing which tends to connect the employee's misconduct with the efficiency of the service; or, in certain egregious circumstances, where the adverse effect of retention on the efficiency of the service could, in light of the nature of the misconduct, reasonably be deemed substantial, and where the employee can introduce no evidence showing an absence of effect on the efficiency of the service, the nature of the misconduct may "speak for itself." *Regardless of its basis, however, this second determination is also subject to review and also may be neither arbitrary nor capricious.* [Emphasis added.]

Young v. Hampton, 568 F.2d at 1257.

Thus, it seems abundantly clear that the fact-finding aspect involves establishing that the acts or conduct underlying the charges actually occurred. Under the evidentiary standard set out at 5 U.S.C. § 7701(c)(1)(B), the existence of those facts must be established by a preponderance of the evidence. Having so established the facts, however, it is necessary to ascertain whether they constitute a basis for concluding that the personnel action was taken for such cause as will promote the efficiency of the service. It seems equally obvious that this determination is a question of law, not of fact, and cannot, under prevailing standards of law, be subject to a standard of proof.⁷

Amici reminded this Board repeatedly that the existence of a nexus in a particular case is essentially a matter of legal conclusion, not of

⁷The majority erroneously asserts that a nexus determination made as a matter of law becomes, a fortiori, an "irrebuttable legal presumption" (Op. 31 n. 40), relying on *Gueory v. Hampton*, 510 F.2d 1222, 1227 (D.C. Cir. 1974) and the Supreme Court's "irrebuttable presumption" opinions cited therein. This blanket assertion represents a fundamental misreading of the decision in *Gueory* and the supporting Supreme Court decisions, all of which reject the application of any doctrine of "irrebuttable presumption" that would fail to provide any opportunity to refute the appropriateness of a classification mandated by regulation or statute. The court was explicit in *Gueory* that those Supreme Court cases hold only that procedural due process is violated when "presumptions are irrevocably applied against an individual who receives no opportunity for refutation." 510 F.2d at 1227 (original emphasis).

A determination of nexus as a matter of law scarcely raises a problem of basic due process since an agency's legal determination of nexus is subject to refutation by an appellant based on the circumstances of each case and to Board review of the agency's reasoning process to the proven facts. Indeed, even those courts which have found that the impact of certain egregious misconduct on the efficiency of the service is "presumed" or "speaks for itself" observe that such a presumption always may be refuted. See, e.g., *Young v. Hampton*, 568 F.2d 1253, 1257 (7th Cir. 1977); *Gueory v. Hampton*, *supra*; *Greboz v. U. S. Civil Service Commission*, 472 F.Supp. 1081, 1088 (S.D. N.Y. 1979).

factual proof.⁸ One amicus pointed out that the nexus question involves balancing and, therefore, it makes no sense to talk about proving a "nexus" by a preponderance of the evidence.⁹ Still another amicus demonstrated the logical consequences of requiring an agency to prove a "nexus" by the preponderance of the evidence.

In the case of an Internal Revenue Officer who failed to file a tax return, a preponderance of the evidence standard might well require the agency to call members of the public to testify that they are less likely to file a tax return themselves, knowing that an IRS employee did not file a return. Under such a standard the agency action might be found unsupportable if the employee called an equal or greater number of witnesses to testify that the employee's misconduct did not adversely effect [sic] their confidence in and trust in the IRS.¹⁰

Except to the extent noted above I take no particular issue with the majority's analysis of the off-duty misconduct cases. Nonetheless, I would caution that the majority's cursory treatment of the recent D.C. Circuit decision, *Yacavone v. Bolger*, No. 79-2043 (Feb. 20, 1981), *rev'g* 470 F. Supp. 777 (D.D.C. 1979) is unfortunate and dangerous. Writing for the court, Judge Tamm¹¹ expresses succinctly the views of the District of Columbia Circuit on the state of the law in this area (slip op. at 6-7):

The role of the courts in this area of federal employment relations is strictly limited. As long as the decision of the agency is not *arbitrary or capricious*, was reached in accordance with relevant procedural requirements, and does not otherwise violate the Constitution, it must be affirmed by the courts. *Doe v. Hampton*, 566 F.2d 265, 271-72 (D.C. Cir. 1977). As the case law has developed, courts have framed the "efficiency of the service" issue in terms of requiring a "nexus" between, as this court phrased it in *Doe v. Hampton*, "the articulated grounds for an adverse personnel action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate governmental interest promoting the 'efficiency of the service'." *Id.*, 272. In some cases, the nexus must be explicitly demonstrated by the agency e.g., *Phillips v. Bergland*, 586 F.2d 1007, 1011 (4th Cir. 1978); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969). In others, the nexus can be inferred from the circumstances of the dismissal; e.g., *Doe v. Hampton*, *Gueory v. Hampton*, 510 F.2d 1222 (D.C. Cir. 1974). [Emphasis added.]

⁸See Wigmore, *Evidence* §§ 1(b), 1806 (3d ed. 1940).

⁹Amicus Brief of the Department of the Navy at 17-18.

¹⁰Amicus Brief of the Department of the Treasury at 9.

¹¹Joined by former Chief Judge Wright and Judge MacKinnon.

In my judgment this decision falls squarely within the mainstream of judicial pronouncements on the law in off-duty misconduct cases and should guide the decisions of this Board.

I would note also that the efficiency of the service standard has been applied almost universally by the courts over nearly two decades without any attempt to ground it on whether or not an agency has met its "burden of proof." This has not been changed or eroded by "judicial circumstance," by court decisions, or by the Reform Act of 1978. Certainly this Board should not attempt to modulate it by fiat. Judicial recognition that some forms of wrongdoing are in themselves inconsistent with federal employment precludes an attempt by the Board to reduce the statutory standard to a merely factual one conditioned on demonstrable evidentiary proof.¹²

The recognition of a class of wrongdoing which is in itself inconsistent with federal employment, it is true, carries with it a danger that the civil service will be misused by the arbitrary addition of penalties to those prescribed by the criminal laws. The courts have raised barriers to such abuses by requiring that agencies show a rational connection between misconduct which is not inherently egregious and the efficiency of the service. This judicial gloss was codified by Congress in the Reform Act. However difficult it might be to draw a line of demarcation based on the gravity of the offense does not justify ignoring the fact that the statutory standard, as interpreted by the courts, permits adverse actions based upon a relationship which is not causal in nature. The majority's analysis makes the line-drawing more difficult by focusing solely on the causal question and by implying that it is now subject to evidentiary proof.

In summary, the majority's analysis ignores the legal standard developed by the courts over the last several decades and spawns further confusion in an area of law that already borders on the Kafkaesque.

¹²For example, in *Schnakenberg v. United States*, No. 200-78 (Ct. Cl. March 20, 1979), the "use of force" in oral sodomy by an employee was found to constitute such egregious off-duty misconduct as to make the nexus between the removal and the efficiency of the service self-evident. Similarly, in *Cooper v. United States*, 639 F.2d 727 (Ct. Cl. 1980), the court showed no reluctance in concluding that a Naval civilian employee's off-duty sexual abuse of a five-year-old girl, if proven on remand to the Board, would adversely affect the efficiency of the service. See also *Masino v. United States*, 589 F.2d 1048 (Ct. Cl. 1978) (off-duty transportation and use of marijuana by customs inspector sworn to interdict contraband is misconduct which "speaks for itself"); *Wathen v. United States*, 527 F.2d 1191 (Ct. Cl. 1975), cert. denied, 429 U.S. 831 (1976) (legally faultless killing of mistress by IRS agent acquitted on grounds of insanity is conduct which permits removal to promote the efficiency of the service); *Gueory v. Hampton*, 510 F.2d 1222 (D.C. Cir. 1974) (removal for criminal conduct as demonstrated by conviction for manslaughter, without an explicit showing of the deleterious effect such criminal conduct had on the efficiency of the service, was not arbitrary and capricious).

RUTH T. PROKOP,
Chairwoman.

June 8, 1981